No. 736

Supreme Court, U. S.
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In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

BRIEF

BRIEF OF APPELLANTS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS APPEAL

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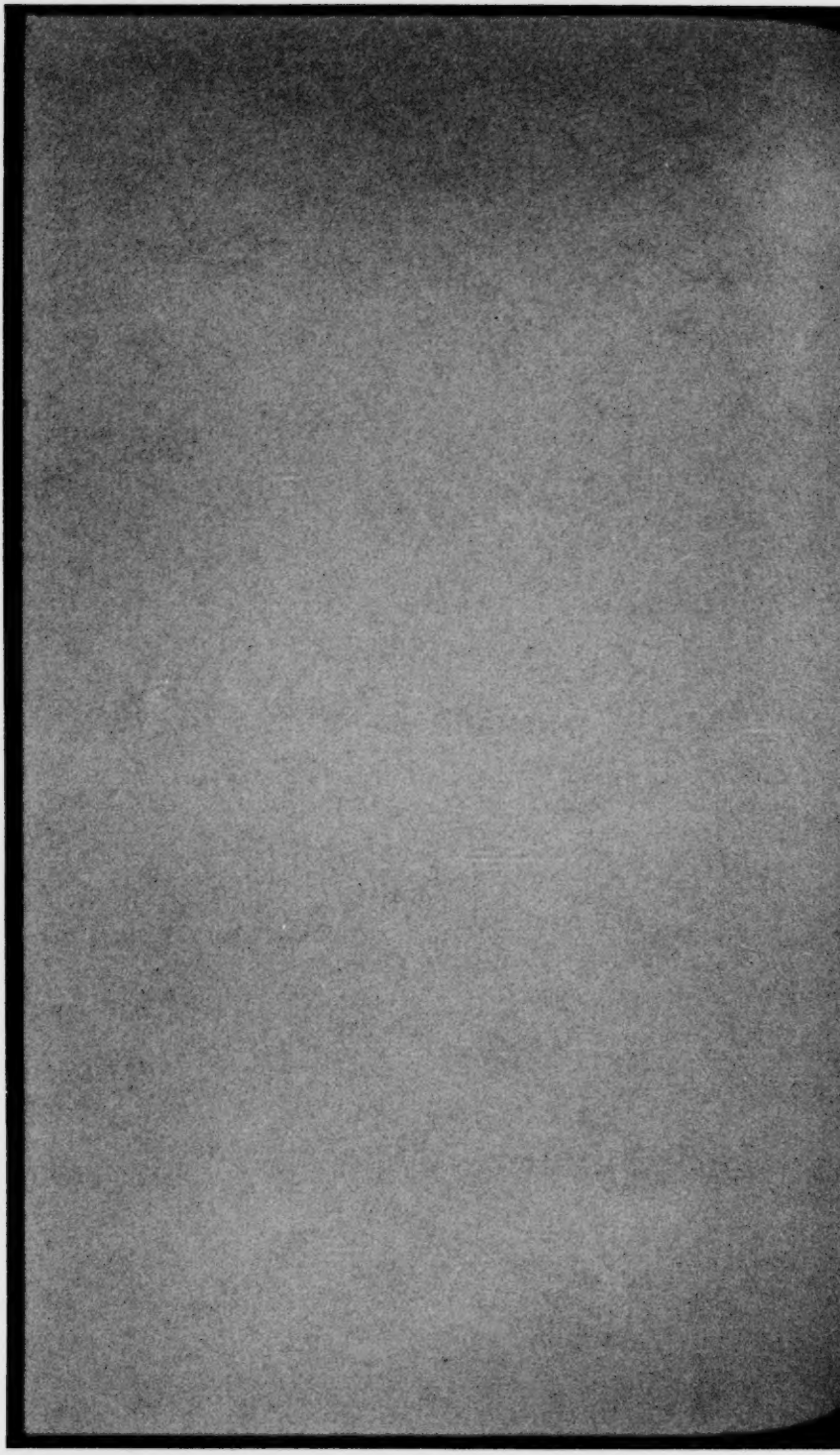

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In The
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Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

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Comes now the Appellants, Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased, and each of them and object to Respondents' motion to dismiss the appeal herein, and files this brief in refutation of Respondents reasons for dismissal.

STATEMENT OF CASE

On May 31, 1884 the United States of America issued patent to an Indian woman, Yaotes Owa, widow of Pooe Owa, to 80 acres of land in Box Elder County, Utah, described as follows: E½ of S. E. ¼ of Sec. 12, T. 11 N. R. 3, W. SLM. Said Patent was issued subject to a five year restriction against alienation. As far as known Yaotes Owa died in the late eighties, intestate, leaving surviving her as heirs a natural daughter commonly called Jane, and a stepdaughter, named Bingwa. The stepdaughter, Bingwa, became the wife of Chief Pocatello, an Indian, and was the mother of Washington Pocatello, and grandmother of the heirs of Washington Pocatello, the Appellants in this cause. The half-sister Jane, the natural daughter of Yaotes Owa, as far as known died sometime in the late nineties withut issue, but leaving surviving her a husband named James Brown; that no probate proceedings were ever instituted to determine the heirship of Yaotes Owa or her natural daughter Jane, and right of succession to this 80 acres of land during all of the years until early in 1917; that some years previous to 1917 about 65 acres of this particular 80 acres were irrigated and placed in a high state of cultivation through some system inaugurated by the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormon Church, for the benefit of the Indians living in that locality, in which benefits none of the rightful heirs to the property ever participated, they being ignorant of any interest in same; that in January, 1917, a white man of the name of Albert Saylor being desirous to obtain title to this valuable 80 acres of land, for either

himself or a white person of the name of U. F. Diteman, concluded that Washington Pocatello, a full blooded Indian, living on the Fort Hall Indian Reservation in Idaho, and a ward of the United States Government was the only surviving heir of Yaotes Owa, and of her daughter Jane, and the only one living entitled to inherit the said 80 acres of land, and the said Saylor hunted up Washington Pocatello, on the Fort Hall Indian Reservation in Idaho, and secured from Washington Pocatello, and his wife Minnie Pocatello, a warranty deed dated February 2, 1917 for the full 80 acres of land to U. F. Diteman, grantee, in the deed for the agreed consideration of $3,200.00, the said deed was for all of the said 80 acres, and recited that Washington Pocatello was the only surviving heir of Jane, the daughter of Yaotes Owa; the said Saylor paying to Washington Pocatello $200.00 cash, and the said Arthur Saylor and Washington Pocatello on the 2nd day of February, 1917 placed the said deed in escrow with the First National Bank of Pocatello, Idaho, to be held by the said escrow holder, until the full sum of $3,000.00 was paid into said Bank, for the said Washington Pocatello in payments of $300.00 per year, the first payment to be made on the 20th day of December, 1917, and $300.00 each succeeding 20th day of December, until the full sum of $3,000.00 was paid, and the said deed was not to be delivered until the full amount of $3,000.00 was paid into the Bank for Washington Pocatello; that actual value of the land at this time was at least $15,000.00. The terms of the escrow agreement were written on the back of a large First National Bank envelope, by, and in the hand writing of Arthur Saylor, and the deed was placed in the said envelope,

the said Bank assumed the duty of escrow holder and took possession of said deed; that on the 18th day of April, 1917, that W. D. Service, cashier of said Bank, made and executed a sworn affidavit that the deed was placed with the Bank in escrow, and definitely quoting the terms of the escrow agreement in part as follows:

> "that said deed is now in the possession of the First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments shall have been made at said Bank for and in behalf of the said Washington Pocatello, to wit: $300.00 on Dec. 20, 1917 and $300.00 on Dec. 20, of each and every year thereafter up and including Dec. 20, 1926;"

that the said Albert Saylor or U. F. Diteman, caused the said affidavit to be filed for record on the 19th day of April, 1917, in the County records of Box Elder, County, Utah, the said affidavit was pleaded verbatim in Paragraph 8 of Appellants' Complaint, Trans. 0186, the making and recording of this affidavit is admitted by the Respondents in Parapragh 8 of their answer wherein they said:

> "Defendants admit that an Affidavit dated April 18, 1917 was recorded on April 19, 1917 at 2:50 P. M. in Book F of Miscellaneous Records in the County Recorder's Office of Box Elder County at Page 613 thereof, and that a copy of said instrument is set out in said Parafraph 8," (Trans. 0230)

that the trial court also found that the terms of the escrow agreement was written on the envelope con-

taining the escrow papers, and that an affidavit was made at the time by the Cashier of said Bank and said affidavit was filed of record, and set forth verbatim in said finding the affidavit, (Finding Number 8, Trans. 0317) that in Finding Number 9, the trial Court finds in part as follows:

> "that the depositary bank had no right to deliver the Deed to said property without full compliance with the terms and obligations of the Escrow Agreement but the Court finds the deed was regular on its face, recited the consideration of $3,200.00 and from the evidence in the case the Court finds that said $3,200.00 recited in the Deed was paid to said Escrow holder and that the transaction with said bank was not Fraudulent," (Finding Number 9, Trans. 0318);

that at the time of the making of the deed and placing it in escrow, Washington Pocatello, signed a waiver of appointment of administrator, and requested that one W. E. Getz, a resident of Box Elder County, Utah, be appointed administrator of the estate of Yaotes Owa, deceased, and qualified as said administrator and acted as such until the close of the administration of said estate; that Washington Pocatello died on or about the 27th day of April, 1917, about 90 days after signing said deed and placing it in escrow; and that Minnie Pocatello, his wife, died about the 28th day of May, 1928, Finding Number 3, (Trans. 0316); also, so found by the Supreme Court of the State of Utah, in their decision at the close of the 3rd Paragraph of said decision, as quoted on Page 105 of the bound volume of

Appellants' petition for appeal to this court; that James Brown, the husband of the natural daughter of Yaotes Owa, called Jane, died sometime previous to 1917, and on June 18, 1918, Letters of Administration was issued to W. G. Getz, on the estate of Jane Brown and her husband, James Brown, for the probation of the same identical 80 acres of land; that both estates were carried on in the District Court of Box Elder County, of Utah, jointly; that on or about the 1st day of November 1919, a hearing was held before Judge Justin D. Call, District Judge of Box Elder County, Utah at Brigham City, Utah for the determination of heirship and distribution of the said 80 acres of land to the rightful heirs of Yaotes Owa, and her daughter Jane; that on the 7th day of November, 1919 the said Judge Justin D. Call did make his findings of fact and conclusions of law, determining the rightful heirs to both estates, finding that at the time of the death of Jane Brown she left no issue, but that she left surviving her a husband by the name of James Brown, and that at the time of the death of James Brown, he left surviving him a son of the name of James S. Brown, and, that James S. Brown was entitled to an undivided ⅔ interest in said land, and that Washington Pocatello was the sole and surviving heir of Bingwa, a daughter of Poe Owa, half-sister of Jane, and that Washington Pocatello's estate is the owner and entitled to an undivided ⅓ interest in said 80 acres of land, and, on the said 7th day of November, 1919, the said Justin D. Call, District Judge did make two decrees, one the estate of Yaotes Owa, setting forth the above stated facts, and decreeing an undivided two-thirds interest of said 80 acres of land to James S. Brown, and an un-

divided one-third interest to the estate of Washington Pocatello, deceased, and made almost an identical decree in the estate of James Brown and Jane Brown; that on the 8th day of November, 1919 both the decrees were filed of record in the County records of Box Elder County, Utah, both decrees were pleaded in Paragraph 6 and made part of Appellants' complaint marked exhibits "C" and "D"; that defendants in their answer admitted all of Paragraph 8 of Plaintiffs' complaint, (Trans. 0229), certified copies of said decrees were admitted in evidence at the trial of the cause; the action of the District Court in making these decrees were not appealed from, and both estates were subsequently settled and closed, and the administrator discharged, and the decrees therefore became final; that on the 7th day of November, 1919 when Judge Justin D. Call made those two decrees he must have figured the value of the said 80 acres of land at that time at $15,000.00 for the reason he decreed a two-third interest to the heirs of the surviving husband of the natural daughter Jane, and one-third to the heirs of the step-daughter Bingwa because the Law of Succession in the State of Utah at that time provided as follows:

> Section 6408 Compiled Laws of Utah, 1917. Titled. Succession in absence of will or marriage contract:
>
> "When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise ex-

pressly provided in this title, or in the probate court, subject to the payment of his debts, in the following manner:

Paragraph 3. Surviving husband or wife; no issue;

"If the decedent leave no issue, all of the estate, real and personal of which the decedent died seized and possessed, if not over $5,000.00 in value, exclusive of debts and expenses, goes to the surviving husband or wife, and if over that value, $5,000.00 in value thereof goes to the surviving husband or wife, and the excess goes one-half to the surviving husband or wife, and the other half to the decedents father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then the one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother and sister, by right of representation; if the decedent leave no issue, nor husband and wife, the estate must go to his father and mother in equal shares, or if either be dead then to the other".

In the States of Utah at that time, and now, the half blood inherited equally with full blood.

The decree in the Yaotes Estate, made a part of appellants complaint, "exhibit "C", (transcript 0202) contains the following order of the court:

"It is ordered, adjudged and decreed that James

S. Brown is the son of James Brown who was the husband and sole surviving heir of Jane Brown, who was the sole and surviving heir of Yaotes Owa, the surviving wife of Tosewitch or Poe Owa, is the owner and entitled to ⅔rds of the property now in the possession of the said administrator of the estate of Yaotes Owa and of Jane Brown and of James Brown, her husband, and the said Washington Pocatello was the sole and surviving heir of Bingwa a daughter of Tosewitch or Poe Owa, by a first marriage and his estate is the owner of and entitled to ⅓rd interest in all of the property now in the possession of the said Administrator of Yaotes Owa, deceased, and of Jane Brown and James Brown, her husband", (trans. 0202).

The foregoing is cited to show that at the time the decree was made, the Court had to value the property at $15,000.00 and that the decree was made to the estate of Washington Pocatello, deceased, and not to him personally, it being known to all that Washington Pocatello was dead, that previous thereto on the 8th day of November 1918 one A. I. Grover had obtained from U. F. Diteman the grantee named in the Washington Pocatello and Minnie Pocatello, deed then in escrow with the Bank, a power of attorney, delegating the said A. I. Grover to act in the place and stead of U. F. Diteman in all matters pertaining to said escrow agreement, and that delivery of the deed to be made to the said A. I. Grover, which said Power of Attorney was filed with the escrow holder (See stipulation filed at the time of trial at request of counsel for respon-

dents—trans. 0245); that on or about the 8th day of November, 1919 that A. I. Grover exercising this power of attorney filed with the First National Bank of Pocatello, Idaho, the escrow holder, a certified copy of the decree of distribution in the estate of Yaotes Owa, and paying to the said Bank only the sum of $1,000.00, just one third the amount that was to be paid to the Bank before the deed could be delivered, it being evident that A. L. Grover figured that the estate of Washington Pocatello, being only ⅓ interest in the land, that the estate should only receive $1,000.00 for the deed, and the said escrow holder on or about the 8th day of November 1919, some 19 months after the death of Washington Pocatello, accepted only the $1,000.00 on said escrow agreement and wrongfully delivered the deed to A. I. Grover, or U. F. Diteman, but the power of attorney to A. I. Grover being on file with the Bank it is reasonable to say that the delivery of the deed was made to A. I. Grover, and the said A. I. Grover on the 10th day of November, 1919, filed the said deed of record in the County Recorder's office of Box Elder County, Utah; that the said A. I. Grover did on the 7th day of November, 1919, secure from James S. Brown and Nancy Brown his wife, a warranty deed to U. F. Diteman for the undivided ⅔ interest that was decreed to James S. Brown paying Brown the sum of $2,000.00 for his interest, and on November the 3rd, U. F. Diteman and Josie Diteman, his wife, executed a quit claim deed of all their interests in the entire 80 acres to A. I. Grover, all of which transfers appears in the Abstract of Title to the land that the respondents admitted in evidence, as evidence of their title, (defendant's exhibit 5) and by virtue of

those transfers A. I. Grover claimed ownership to the full 80 acres of land, without any knowledge or sanction of the heirs of Washington Pocatello, deceased; that on the 3rd day of December, 1919, one Charles E. Foxley, filed petition for appointment of himself as administrator of the estate of Washington Pocatello, deceased, the record showing that Chas. E. Foxley was selected by Judge Justin D. Call and recommended to those ignorant and uneducated Indians to represent them; this fact was pleaded in plaintiff's complaint paragraph 18, (trans. 0193, 0194); and is admitted by the respondents paragraph 18 of their answer (trans. 0213) and also found to be a fact by the trial court in its Finding No. 18, wherein the Court found as follows:

> "That Minnie Pocatello and four of her children appeared in Court on or about November the 1st, 1919 at the time the hearing on the Petition for Settlement of the Account and Distribution in the Estate of Yaotes Owa, deceased; that at said time Hon. Justin D. Call, then Judge of said Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that conferences were thereafter had between said parties and the plaintiffs herein, and their mother then signed a request in the matter of the estate of Washington Pocatello, deceased, for the Court to appoint Charles E. Foxley as administrator of said estate, the said request is attached to and made part of the petition for Letters of Adminis-

tration in the estate of said Washington Pocatello, deceased; that pursuant to said request and after due and legal notice said Charles E. Foxley was as heretofore found duly and regularly appointed as administrator of said estate and thereafter qualified and Letters of Administration were issued to him, and said Letters have never been revoked; that in the summer of 1921 Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello and that after deducting attorney's fee and cost there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties; that said Superintendent Donner then advised said heirs that he did not approve of the settlement of said estate without knowing more about it and spoke something of having the matter investigated; that several months later the heirs were informed from the Superintendent's office that nothing further could be done in the matter; that at different times thereafter said heirs appealed to said Superintendent's office to make an investigation of the settlement, but they were always told that nothing could be done; that said heirs did nothing further in the said matter until the death of Minnie Pocatello when the heirs herein sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took

no further action until the filing of the complaint herein";

That said Charles E. Foxley who Judge Justin D. Call had recommended to those ignorant Indians as one to represent them, was on the 15th day of January, 1920, duly appointed as administrator of the estate of Washington Pocatello, deceased, and took the oath of office and fully qualified as said administrator of the estate of Washington Pocatello, deceased; that said Charles E. Foxley as said administrator filed no inventory whatsoever in said estate with the District Court, but on the other hand he secured a certified copy of his Letters of Administration, of the Estate of Washington Pocatello, deceased, and filed the same with the First National Bank of Pocatello, Idaho, (See stipulation filed by respondents, at time of trial and accepted by the Court as part of the record in this case, trans. 0245); that the said Bank, sent to said administrator the sum of $995.00, of the $1,000.00, paid to the Bank by A. I. Grover for the Washington Pocatello and Minnie Pocatello Deed; that said Charles E. Foxley as administrator of the estate of Washington Pocatello, deceased, did on the 3rd day of March, 1921 file with the District Court of Box Elder County, Utah in the matter of the estate of Washington Pocatello, deceased, his Final Account, and Petition for Settlement and Distribution, thereof, and in said Final Account and Petition for Distribution, he reported as follows, to wit:

"that he received from the First National Bank of Pocatello, Idaho, from a Land Contract of sale

by deceased and wife, $995.00,

Under title, Brief description of property, he stated:

"The property described in the petition for letters of administration as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East ½ of Section 12, Tp. 11 N. R., 3 West, S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello";

That the said final account contained a prayer that the account be allowed, proved and settled.

That the said final account was accomplished by a petition for distribution directed to the District Court of the First Judicial District of the State of Utah in/and for the County of Box Elder and said petition contained a prayer that the said administration of said estate may be brought to a close and that he may be discharged from his trust as such administrator; the said final account filed by Charles E. Foxley, stated positively that he only received $995.00 from the escrow depositor, for the Washington Pocatello Deed, and said administrator claimed one half of that amount, $497.00, for himself as attorney fee in the matter, and $7.00 costs, leaving $491.00 to distribute to the heirs; in this connection the Appellants again quote part of the Trial Court's Finding, No. 18, as follows:

> "that in the summer of 1921 that Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello and that after deducting attorney's fee and costs there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties" (Finding No. 18, Trans. 0321).

that the District Court of Box Elder County, Utah, never at any time held any hearing or made any disposition of the Final account and Petition for Distribution, in the estate of Washington Pocatello, deceased, and the records show that the said estate has remained to this day without even an inventory or appraisement, and unsettled by said Court; the Probate Court record in the Matter of the Estate of Washington Pocatello, deceased, was admitted in evidence (Plaintiff's exhibit "M") which discloses that on the 3rd day of March, 1921, the Clerk of the said District Court made an Order fixing time for Final Distribution, in the Matter of the Estate of Washington Pocatello, deceased, for Monday, the 14th day of March, 1921, at ten o'clock A. M., and the Court Room at the County Courthouse as the place. And proper notices were sent out; the said probate record further discloses that no action was taken on the Matter, at the time set; that the probate record further shows that a written objection to the allowance of the account and the settlement of the estate on behalf of the heirs, dated March 14th, 1921, made by one B. C. Call as Attorney

for contestants, was filed in the said Matter on the 27th day of August, 1921, the probate record further shows that on the 12th day of September, 1921, Albert A. Law as Judge of said Court made an order of Continuance in said Matter to the 10th day of October, 1921; that on the 10th day of October, 1921, the said Judge Albert A. Law, made another Order of continuance of said Matter to the 14th day of November, 1921; that on the 14th day of November 1921, the said Judge Albert A. Law made another Order of Continuance of said Matter to the 12th day of December, 1921; that on the 12th day of December, 1921, one L. B. Wright, signing as Judge, made another Order of Continuance of said Matter to the 9th day of January, 1922; that on the 9th day of January, 1922, one Wm. W. McCrea, signing as Presiding Judge, made another Order continuing the said matter to the 13th day of February, 1922; that the probate record in the estate of Washington Pocatello, deceased, discloses that no action was taken, or any hearing had on the said matter on February the 13th, 1922, and the record discloses no further order or action by the Court in any manner whatsoever was taken in the Matter of the Estate of Washington Pocatello, deceased, by the District Court until this suit was filed; that during all the years from January the 9th, 1922, a matter of seventeen years, the District Court of the First Judicial District of the State of Utah in and for Box Elder County, failed, refused and neglected to do its duty, and give any protection to the heirs of the estate, and failed, refused and neglected to hold a hearing on the Final Account and Petition for Distribution in the Matter of the Estate of Washington Pocatello, deceased, but, that some-

time later, the exact time being unknown to the Appellants, the Administrator, George E. Foxley, left the Stat eof Utah for parts unknown, took with him, or to himself all of the $995.00, he received from the escrow holder, that A. I. Grover paid for the Washington Pocatello Deed, and the Probation of the Estate of Washington Pocatello, deceased, is today still on the Docket in the District Court of Box Elder County, Utah, unsettled and undisposed of; and the heirs of said estate have never received one cent of the estate; this suit was first filed by the heirs of Washington Pocatello, deceased, in their own name, and respondents came into court and demurred on the very ground that the record disclosed that an Administrator had been appointed in the Washington Pocatello Estate, and that the Estate had never been closed and therefore the heirs could not sue for or ask for an accounting of the rents and profits, that only the administrator could do that, the Court sustaining said demurrer a Special Administrator was appointed who joined the heirs in this suit; respondents answered the third amended complaint of Appellants and filed a further and separate answer (trans. 0229 to 0233), and prayed for affirmative relief, that the title to the undivided one-third interest be quieted in Amasa L. Clark and Joseph E. Robinson, who as alleged in the pleadings, purchased the entire 80 acres of Land from Albert I. Grover, and Hortense Grover, his wife, on the 28th day of March, 1925, paying $12,500.00 for the same. Appellants replied to the Further and Separate Answer of the respondents, and the respondents filed a supplemental answer at time of trial (trans. 0247), and on those issues the case was finally tried before the Hon-

orable Lewis Jones, District Judge of Box Elder County, Utah; Both documentary and oral evidence was admitted, including the full Probate Proceedings in said District Court in the Matter of the Estate of Washington Pocatello, deceased, and the Decrees of Distribution and other documents; Respondents placing in evidence the Abstract of Title they received from A. I. Grover (Def. Ex. 5), and briefs were filed and the case orally argued to the Court, and on the 23rd of October, 1939, Judge Lewis Jones made and filed his memorandum decision as follows to-wit:

> "The Court: In the case of Laura Morris, Special Administratrix, vs., Clark and Robinson, the Court directs the findings and decree be prepared in favor of the defendants and against the plaintiffs, for the reason the court is not convinced from the record here but what the full amount of the escrow had been paid by Saylor or Diteman, or some of the other parties in interest, and for the reason that it affirmatively appears that during the minority of these Indians an administrator was acting or supposed to be acting, in this jurisdiction, a fact which these Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the statute of limitations will run against a minor during the time the personal representative is acting.
>
> "So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow can not be held

to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of $3,200.00. Nor does the affidavit of Grover, as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants, were, in effect, innocent purchasers for value.

"Now in view of the fact that I did not fix a date for rendering a decision in this matter. I will ask the reporter to make a transcription of this decision, and counsel for the defendants is requested to prepare and present to this Court not later than November, the 27th, 1939, after notice to Counsel for plaintiff, proposed findings, conclusions and decree" (trans. 0312);

That the Court signed and filed thirty Findings of Fact, as prepared by Counsel for the respondents, (trans. 0315 to 0324), and Conclusion of Law, (trans. 0324) and a decree quieting title in defendants, Amasa L. Clark and Joseph E. Robinson, to the undivided one-third interest in said 80 acres of land that was decreed to the estate of Washington Pocatello, deceased, and dismissed plaintiff's both Causes of Action (trans. 0325 to 0326); Plaintiffs filed an exception to the said Findings of Fact, Conclusions of Law, and decree (trans. 0314); that on the 23rd day of February, 1940, that Appellants appealed the said Cause to the Supreme Court of the State of Utah, the same being the highest court in the State of Utah, the said appeal being taken on both questions of law and fact; it is admitted by

Appellants that their counsel failed to serve on defendants and file a proper Bill of Exceptions with the Trial Court within the time fixed by the Court to file the same; that Appellants petitioned the Trial Court for relief under Section 104-14-4. Revised Statutes of Utah, 1933, (trans. 0343, 0344) respondents objected to the Petition for Order of Relief, and objected to the Trial Court granting relief (trans. 0356, 0357); That the Trial Court after hearing said petition and objection in its discretion, made its findings of fact and conclusions of law, (trans. 0358, 0359) granting to Plaintiffs the relief prayed for, and made the following order:

> "ORDERS AND DECREES, that plaintiffs be and are hereby relieved from their default in not filing and serving a proposed Bill of Exceptions before the time for such filing had expired, and that permission is hereby granted to Counsel for Plaintiffs to forewith serve proposed Bill of Exceptions upon Counsel for Defendants and have same settled by the Court.
>
> Dated this 11th day of March, A. D. 1940.
>
> (s) LEWIS JONES, District Judge

That Plaintiffs immediately filed and served their proposed Bill of Exceptions on Counsel for Defendants, (trans. 1 to 55, Second Volume of Record) and the Trial Court, on a day appointed, settled the said bill of exceptions, by the following language:

> "The foregoing bill of exceptions contains all the testimonial evidence adduced on the trial of

this cause, and correctly contains the various proceedings during the trial as well as subsequent thereto, the same being true and correct, it is accordingly settled and allowed as a Bill of Exceptions in this cause.

Dated, Brigham City, Utah, April 15th, A. D. 1940."

(s) LEWIS JONES, District Judge

(Trans. 80, Vol. 2, Abstract of Record).

That the transcript on appeal (trans. 80, 2nd volume) containing the bill of exceptions was in due time lodged in the Supreme Court of the State of Utah; that subsequent to the appeal being lodged in the Supreme Court of the State of Utah, the respondents moved the Supreme Court to strike appellants Bill of Exceptions, on the ground that Appellants were not entitled to the relief granted by the Trial Court, and the said Supreme Court of Utah disregarding the United States Statute, Sec. 194, 25 U. S. C. A. and disregarding the facts that this is a case in equity, and disregarding the Statutes of Utah, and the many decisions of the Supreme Court of Utah, holding that in all cases of equity the Supreme Court must pass on the questions of fact as well as questions of law, as hereinlater cited, did, on the 17th day of July 1940, make an order striking Appellants Bill of Exception from the record; that respondents then moved the Supreme Court of Utah to dismiss Appellants appeal; that the said Court did on October 4th, 1940, deny the motion to dismiss the appeal and heard the case on the judgment roll only, and finally rendered the decision from which this appeal is taken to this

Court; the Supreme Court of Utah declined and refused to take judicial notice of the probate proceedings and record in the Matter of the estate of Washington Pocatello, deceased, which appellants contend is part of this cause, and the Supreme Court of Utah refused to recognize that the Final Account of the Administrator, in the estate of Washington Pocatello, deceased, where in the Administrator reported that only $1,000.00 was paid to the escrow holder for the Washington Pocatello deed was evidence that only that amount was paid, the said Court holding in paragraph 7 of said decision, as follows:

> "Despite the striking of their Bill of Exceptions, Appellants argue that such finding is not supported by the evidence. They contend that by the admissions in Defendant's pleadings, that Foxley, Administrator, had reported in the estate proceedings the receipt of only $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank hereinbefore adverted to, setting forth the terms of the escrow was placed on record, plus the record of the probate proceedings in the Estate of Washington Pocatello—of which though contained in the stricken bill of exceptions, they contend we must nevertheless take judicial notice—it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we can not agree. The report of the administrator was never heard or passed upon by the probate court. We can not say that it necessarily spoke the truth with respect to the amount received by the administrator from

> the bank, nor that the report established that the bank delivered to him the total amount paid by the grantee in the deed, especially since the stricken bill may contain evidence which precludes any inference whatever which might possibly be drawn therefrom:"

It was and is the fault of the District Court of Box Elder County, that the final account of the administrator Foxley, lie on the Docket of said District Court for full 17 years, without the court doing its duty to the heirs and, to the estate, by holding a hearing on said Final account, and thereby permitting the Administrator to take the $995.00 to himself, that at the trial of this case respondents never even attempted to refute, or offer any evidence that the report of the Administrator was wrong, or that the full amount had been paid, but on the other hand pleaded that they had no information or beliefs as to whether such allegations were true or not, and that now owing to the lapse of time, the respondents had no means to tell whether the allegations were true or false, and the trial court record discloses that the defendants at the trial never attepted to offer a scintilla of evidence that more than $1,000.00 was paid by A. I. Grover to the escrow holder for the Washington Pocatello deed. The report of the administrator of Washington Pocatello, estate is strong prima facia evidence, and enough to put the burden on the respondents under Sec. 194, 25 U. S. A. C. to prove that the full amount was paid to the bank before the deed was delivered and furthermore, it was sufficient evidence under the general rule of evidence, in actions to quiet title, wherein the

defendants come in and ask the title to be quieted in them, and especially where it is known to the world that the deed the defendants claim under was placed in escrow, not to be delivered until the full performance of all conditions of the escrow, and it is pleaded that the conditions of the escrow agreement were not fully performed.

Appellants contend that there is at least four Federal questions involved in this action, as set forth in their petition and statement of Jurisdiction that accompanies the petition of appeal to this Court and Appellants will try and present all those questions in this brief as pointedly and briefly as possible.

First:

In the first and second paragraph of their motion to dismiss and also in the first and second paragraph of their grounds against the jurisdiction of the Supreme Court of the United States Respondents allege:

> "1. That the record affirmatively shows that no federal question is involved in this action.
>
> 2. That no federal statute or treaty is involved and the State Court has made no judgment nor has there been any holding as to a federal statute or treaty."

The Respondents in reviewing the matters set forth by the Appellants in their first order, say as follows:

> "Appellants first contention is that the District

Court wrongfully placed upon the appellants the burden of proving compliance with the terms of the escrow agreement. They base this contention upon 25 U. S. C. A., Sec. 194, which provides:

> 'In all trials about the right of property in which an Indian may be a party on one side and a White person on the other, the burden of proof shall rest upon the White person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession of ownership.'

And then Respondents go on to say:

> "This statute has two possible interpretations, one is that it places the burden of going forward with the evidence upon the White person, the other is that it places the burden of pursuasion upon the White person.
>
> "If it is construed as dealing with the burden of going forward with the evidence, respondents affirmatively satisfied this burden. Respondents showed, as the lower court expressly found that they claimed under a deed which had been properly recorded. By this showing the presumption arose that the conditions of the Escrow were fully complied with." (Citing two cases which we will deal with later.)

In paragraph 2 of their Motion, and paragraph 2 of their Statement, Respondents emphatically declared that no Federal Statute is involved and the first

order of their argument, they recognize and quote a federal statute, and proceed to place a strained interpretation upon said statute to favor respondents, thereby to try to get away from the Statute. If no Federal Statute is involved, then why do respondents try to impress upon this High Court their interpretation of a Federal Statute in their favor? Appellants contend that the Respondents, by their analysis of this statute have clearly established a Federal question in this case, that it is within the jurisdiction of this Court to decide, even if Appellants did not discuss the Statute further. However, Appellants beg the permission of this Court to further discuss this Statute, as it appears that this Court has not had to construe this statute before, at least Appellants are unable to find a case where this Court had this particular Statute before it.

The history of this Statute is that it was enacted by the Congress of the United States some 107 years ago, and is in full force and effect today. It is very evident from the wording of the Statute, which is very clear and unambiguous in its language that it was enacted by the Congress of the United States for the protection of Indians, and Appellants do not hesitate to say, that it is only subject to one interpretation, and not by any means subject to the strained double interpretations attempted to be placed thereon by Respondents in their favor. The meaning of the language of the Statute is clear, and is only subject to one interpretation, and that is, that in all trials about the right of property between an Indian and a White person, when the Indian makes out a presumption of title in himself, the White person must prove his title to be superior to the Indian's title, and as heretofore said was en-

acted for the protection of Indians all over the United States. And the protection of that Statute follows the Indian in all Courts, and the Supreme Court of the United States is the Court of last resort to determine whether or not the Indian was granted or denied that protection at the trial of the cause and the immunity and privilege guaranteed him by the Statute. And it is immaterial before this Court, whether the Bill of Exceptions was stricken by the Supreme Court of a State, and such Court refused to examine the evidence produced at the time of trial. This Honorable Court, in order to determine whether that protection, privilege and immunity was given to the Indian at the time of trial, has jurisdiction to order the whole record up for this Court's examination to determine the question. In the cause at bar it is admitted and conceded that the Appellants, the heirs of Washington Pocatella, deceased, and Minnie Pocatello, his wife, are and at all times were full blooded Indians, non-residents of the State of Utah, living on the Fort Hall Indian Reservation in Idaho, under Indian tribal relations, and wards of the Government, and that by the law of decent and distribution of the State of Utah, they inherited from their ancestor a valuable property right in the State of Utah. That this inheritance was decreed to them by a solemn decree of the District Court of the First Judicial District of the State of Utah, which created the highest muniment of title in these Indian heirs that it is possible to possess, and when the said District Court failed, refused and neglected for seventeen years to settle their estate, and they were compelled to finally file a suit in said Court to try and recover the property that rightfully belongs to them,

under and by virtue of the Act of Congress, June 30, 1834, Sec. 22 of Act; 161, Sec. 22, 4 Stat. 733, R. S. Sec. 2126; Sec. 194, U. S. A. C. Vol. 25, the Supreme Court of the United States has the final say as to whether those Indians were afforded or denied that protection in the State Courts.

Respondents in support of their contention that there is no Federal question involved, and in support of their interpretation of this United States Statute, cite two cases, which have no bearing on the question whatsoever, and why respondents should cite the case from Minnesota, namely, Merchants & Farmers State Bank by Peyton v. Olson, 189 Minn. 528; 250 N. W. 366, 89 A. L. R. 1289 is beyond Appellant's understanding, that case is so much stronger for the Appellants in the case at bar, that we pray the indulgence of this Court to quote from the decision:

> "1. Where an instrument placed in escrow is delivered by the escrow holder either in violation of, or without compliance with, the terms or conditions of the escrow agreement, no title passes by virtue of such delivery, because in legal contemplation it is no effectual delivery and the grantee thereunder obtains no more right than he would have in possession of a forged or stolen instrument. Henry v. Hutchins, 146, Minn. 381, 178 N. W. 807, Bergstrom v. Picket, 148 Minn. 224, 181 N. W. 343; Knap v. Nelson, 41 Colo. 447, 92 Pac. 912; Evans v. McKinney, 308 Ill. 100, 139 N. E. 106. The obtaining of the delivery of the deed held in escrow by any means short of performance of

the conditions of the escrow is against the assent of the grantor, and since this assent is essential to the delivery and the delivery essential to the validity of the deed, no title passes. Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 318; Daget v. Daget, 143 Mass. 516, 10 N. E. 311; Calhoun County v. American Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; Los Angeles High School Dist. v. Quinn, 195 Cal. 377, 234 Pac. 313; Weghorst v. Clark, 66 Colo. 535, 180 Pac. 742; Coe v. Turner, 5 Conn. 86; Evans v. McKinney, 308 Ill. 100, 139 N. E. 99. If no title passes to the grantee named in the deed, then, of course, he can pass nothing on to an innocent subvendee. Balfour v. Hopkins, 93 F 564, 35 C. C. A. 445; Fearing v. Clark, 16 Gray (Mass.) 74, 76, 77 Am. Dec. 394; Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 604, 18 S. Ct. 788, 42 L. Ed. 1156; Devlin on Deeds (3rd Ed.) Sec. 322. In so far as Murray v. Foskert, 114 Minn. 44, 130 N. W. 14, indicates a different rule, it is hereby overruled.

2. & 3. Omitted.

"4. It is true that a grantor whose deed has been wrongfully delivered may under some circumstances be estoped as against his grantee or subvendee from setting up the wrongful delivery of the deed . . . . . ."

Respondents again on page 2 of their statement, attempt to put a construction on Sec. 194, 25 U. S. C. A., as follows:

> "If it is construed as dealing with the burden of going forward with evidence, respondent affirmatively satisfied this burden. Respondent, shows, as the lower Court expressly found, that they claimed under a deed which had been properly recorded. By this showing the presumption arose that conditions of the escrow were fully complied with."

That is not the law, where it is shown that a deed was placed in Escrow, and it is alleged that it was wrongfully delivered, the same as if it were stolen or forged, there is no presumptions of a valid delivery, and the above case from Minnesota cited by the respondents expressly holds to the contrary. It is true the Minnesota Court did say as follows:

> "It follows if Melford can prove what he proposes to prove, the deed was wrongfully delivered and carries no title, and if there are no superior equities on the side of the bank which estop Melford from establishing the wrongful delivery and consequent non passage of title."

But the case before the Minnesota Court was not an action to quiet title, where in it was admitted that the deed Respondents are claiming under was placed in escrow not to be delivered until certain conditions were fully performed, and the conditions were never performed and it was not a case where Respondents came in and pleaded ownership through a deed that they admitted was placed in escrow, not to be delivered until certain conditions were performed, nor where the escrow deposit was published to the world,

and Respondents pleaded ignorance of whether the conditions were performed or not, but relied upon the contention that because the deed was filed of record and it recited a consideration of $3200.00, that thereby the Respondents were innocent purchasers for value and it must be presumed that there was a valid delivery, and pleaded as was done in the case at bar for affirmative relief, that the Court quiet title in respondents to the said undivided one-third interest. So the Minnesota case does not apply at all, because that Court said, in paragraph 7 of its decision,

> "This is an action to determine adverse claims, and the relief sought does not include possession."

The other case cited by Respondents, namely Swain v. McMillian, 31 Mont. 433, 76 Pac. 943, 946, is not by any means a case identical with the case at bar, the quotation taken by Respondent from the case as appears on page 3 of Respondents statement as follows:

> "When one appears of record to be the owner in fee of real estate, another alleging the contrary must show the fact by clear and convincing proof."

is not in point in the case at bar. In the Montana case, the Plaintiff who made the deed and was claiming the property was not an Indian, and he was not dead at the time of delivery, and Defendants pleaded he had knowledge of the delivery. On this point the Court held:

> "The gist of the foregoing is that Plaintiff made a deed, and placed it in escrow, to be delivered in

six months upon the performance of certain conditions. He alleges these conditions were never performed. Defendant alleges that they were. Plaintiff alleges that thereafter, and by some means unknown to him, the Defendant became possessed of the deed, paying or rendering no consideration therefor. The Defendant alleges that plaintiff was paid the entire consideration for the deed, and that it was delivered in accordance with the escrow agreement, and by and with the consent of the Plaintiff. All of these were material allegations on the part of plaintiff, and all were denied. The burden was upon the Plaintiff to prove them and this he failed to do."

How is that case an authority that the Supreme Court of the United States under Section 194, 25 U. S. A. C. has no jurisdiction to hear this case. Respondents then on Page 3 of his statement goes on to say:

"Thus even though the ultimate burden of going forward with the evidence was placed on the Appellants, such a placing of the burden would be correct in spite of the Statute providing the burden should be on the White person, for, although the burden was originally on the Respondents, this burden shifted to the Appellants when the Respondents entered evidence from which the presumption arose that the conditions were complied with. The Lower Court found that Appellant offered no evidence to rebut this presumption so a Finding against the Appellants was justified."

In that argument, Respondents, or more properly, Counsel for Respondents, is putting his own wrongful construction in favor of his clients, White persons, upon a Statute of the United States, that was enacted for the sole purpose of protecting Indians from being robbed of their property in the manner and way they were robbed in the case at bar, and in the same breath saying to the Supreme Court of the United States there is no Federal question, and no Federal Statute involved, and further Appellants allege the case at bar conclusively shows the Appellants furnish positive evidence that A. I. Grover only paid $1,000.00 for the deed, when the report of the Administrator in the estate of Washington Pocatello, deceased, was admitted in evidence.

Again Respondents say:

> "If, on the other hand, the statute be construed to deal with pursuasion rather than the burden of going forward with the evidence, error can not be shown that would involve a weighing of the evidence as there is no evidence to be reviewed by this Honorable Court since the Appellant's Bill of Exceptions has been stricken."

If the protection for Indians enacted by the Congress of the United States, in Section 194, 25 U. S. C. A. does not follow the Indian litigant to all Courts, and especially to the Supreme Court of the United States, which Honorable Court has the final say in interpreting and construing all U. S. Statutes, then the law is a dead letter. If it can be done, as was done in the case at Bar, despite the Trial Court in its discretion, grant-

ing relief to the Indian, and permitting a Bill of Exceptions to be served and filed, and the said Court settling such Bill of Exceptions, then when it reaches the Supreme Court of the State if the Respondent can come in and move the Supreme Court to strike the Bill of Exceptions, and thereby circumvent that Statute and thereby prevent the Supreme Court of the United States from reviewing the evidence in the case, then the statute is a dead letter.

This is a case in equity, before this Honorable Court, just the same as it was a case in equity before the Trial Court, and the Supreme Court of Utah, and when respondent moves this Honorable Court to dismiss the appeal, they have to do it with clean hands, they can not profit by their own acts. The United States Statute in question, does not deal in presumptions for the White persons, and an Appellat Court has no right to presume just from the Findings of the Trial Court that the White person assumed the burden and proved his title, without reviewing the evidence.

Respondents on page 4 of their statement, in concluding their contention that under this U. S. Statute there is no Federal question they say:

> "Appellants made no assignment of error as to the burden of proof so the entire question argued above is not even before the Appellant Court."

Appellant is at a loss to know what Respondent means by that assertion. If they mean, No Assignment of Error as to burden of proof is made to this Honor-

able Appellate Court, we call attention to Appellant's first assignment of error, if that is not an Assignment of Error as to burden of proof specifically under the U. S. Statute in question, then no such Assignment of Error can be made.

If Respondents mean that no Assignment of Error was made to the Appellate Court of the State of Utah, we call the Court's attention to Appellant's 6th Assignment of Error, before the Supreme Court of the State of Utah, which in part reads as follows:

> "The Plaintiffs proved the escrow agreement, and that the deed was placed in escrow, and it is so found by the Court in its findings of facts. Findings Nos., 3 and 6 (Abstract 113-114), and it is a settled rule of law that when it is proven that an instrument was placed in escrow, then the burden is on the party claiming under the instrument to prove that all the obligations of the escrow agreement were fully performed before the instrument was delivered. Further, the Plaintiffs being Indians, the burden of proof shifted to the Defendants, they being White persons under the laws of the United States of America. By the Act of June 30th, 1834, which provides as follows:"
>
> '(and Appellants set out verbatim the United States Statute in their Assignment of Error and then Continued)'
>
> "In this case the Court found that title of the land was in Washington Pocatello, and his heirs, Findings Nos. 6 and 8, (Abstract 114-118), con-

> sequently the burden of proof was upon the Defendants to prove the deed was not wrongfully delivered."

How can Respondents say now that no Assignment of Error was made on the burden of proof.

Appellants also in their reply brief to the Supreme Court of Utah cited and argued the burden of proof and quoted the United States Statute, on page 27 of Appellant's printed reply brief in the Supreme Court of Utah, said:

> "In conclusion, Appellants summarize the Facts disclosed by the Judgment Roll, imposed upon the Respondents four different and distinct burdents, none of which Respondents even attempted to meet.
>
> "First: It being admitted that the Plaintiffs were and are full-blooded Indians, and Wards of the Government, and it was shown that they were not only the presumed owners of the undivided one-third interest in the land, but the legal owners, the burden is placed upon the white man that claims that property to prove good title to it, and we quote the United States Statute on that point."
>
> (And then Appellant set out verbatim the said United States Statute).

Appellants briefed this question to the Trial Court, and argued it to the Trial Court, and also argued it to the Supreme Court of Utah.

The policy evidenced by the said Statute is expressed in an opinion of the U. S. Attorney General, wherein he said:

> "This section is evidence of the Policy of the Government to give Indians the benefit of the doubt on questions of fact or construction of treaties or Statutes to their welfare." 34 Op. Atty. Gen., P. 439 (1925).

In all sincerity Appellants ask this Honorable Court, is it not the jurisdiction of this Court to construe and define the policy of the Government in enacting any of its Statutes of the United States?

Second:

Appellants as a second Federal question contend that Washington Pocatello, and Minnie Pocatello, being Indians, wards of the Government, and incompetent, which means nothing more than they are wards of the Government, not having received a certificate of competency from the Government, which was proven at the trial, was the case of Washington Pocatello, and Minnie Pocatello, his wife, by Fred A. Gross, Superintendent of the Fort Hall Indian Reservation, who testified to the Court from the record of enrollment of Indians on the Fort Hall Indian Reservation in Idaho, that Washington Pocatello and Minnie Pocatello were regularly enrolled as Shoshonie Indians, and that the record showed that neither one of them had received a certificate of competency from the Government (Pages 11 and 12 transcript of testimony).

Appellants concede that the question of whether Washington Pocatello and Minnie Pocatello had the power to execute a valid deed in the first place is not the paramount question in the case at bar. The cardinal fundamental principles of law pertaining to constitutional rights of heirs inheriting property, guaranteed by the Constitution of the United States, and of every State in the Union, has been so ruthlessly disregarded and trampled under foot, in stealing a valuable inheritance from these Appellants, non-residents of the State of Utah, and giving it to residents of the State of Utah, in the case at bar, that even if they were White persons they would have a right to appeal to this Honorable Court, from the decisions of the Courts of the State of Utah which question will be considered later in this brief. However, the Appellants being Indians, they contend that under the following Statutes of the United States, that Washington Pocatello had no capacity to execute a deed in the first place, and that when Washington Pocatello died shortly after executing the deed and long before the inheritance was decreed to his estate, that his deed executed and placed in escrow was invalid, and in that respect we quote the following United States Statutes:

> "Act of Congress, March 3rd, 1871, c 120, Sec. 3, 16 Statute at Large, 570. U. S. Code, Compact ed. Sec. 81, 25 U. S. C. A. Sec. 81."

The following are some decisions rendered on this Statute, while no one of the cases includes the sale of an inherited homestead of an ancestor, which is contended by Respondents, that this being a homestead

from the Government to Yaotes Owa, the ancestor, that although the heirs were incompetent wards of the Government, that Washington Pocatello and Minnie Pocatello had capacity to deed away such a valuable right, notwithstanding they could not legally enter into other and more minor contracts, for the reason that the patent to the ancestor was only subject to a five year restriction against alienation which had long since expired. If that is the law, it is certainly a strange doctrine. We cite a few cases construing these statutes:

> "Object of Statute:—This section is enacted for the protection of Indians while under the protection of the Government and living upon their reservation."
>
> Whirlwind v Von der Ahe, (1896) 67 Mo. App. 628.
>
> "Duty of United States with respect to Indians: —This section and sections 82 and 83 of this title, are only intended to protect the Indians from improvient contracts, and do not create any legal obligation on the part of the United States to see that Indians perform their part of the contracts."
>
> In re Sanborn (Ct Cl. 1893) 13 S. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429.

The land involved in the Washington Pocatello Deed was inherited land, and Appellants contend is governed by the following Act of Congress:

> Act of Congress, May 27th, 1902, c 88, Sec. 7,

32 Stat. 275; U. S. Code Compact Ed. Sec. 379, 25 U. S. C. A. Sec. 379: Which reads as follows:

> "The adult heirs of a deceased Indian to whom a trust of other patents containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon the petition filed by the Guardian, **but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.**"

This Honorable Court has held in a former decision, opinion delivered Mr. Justice Clarke as follows:

> "Congress provided, in May 27, 1902 (32 Stat. at L. 245, 275, Chap. 888, Comp. Stat. Sec. 4223, 3 Fed. Stat. Anno., 2d ed. P. 846), that adult heirs of a deceased Indian might sell and convey full title to inherited lands, free from restrictions, but only by conveyances approved by the Secretary of the Interior; and that the interest of minor heirs might also be so sold and conveyed upon petition of a guardian, on order of a proper court, and when the sale was approved by the Secretary of the Interior. Under this Statute the land in controversy was sold in the public manner required by the rules of the Department of the Interior,

and for the purpose of this decision, all required action is assumed to have been, in form, properly taken."

Bluejacket v Ewert (C. C. A. Okl. 1920) 265 F 823, modified (1922) 42 S. Ct. 442. 259 U. S. 129, 66L Ed. 858.

Appellants contend the above decision establishes the fact that Washington Pocatello, and Minnie Pocatello, could not give a valid deed in the first instance. And the burden of proof was on the Respondents to show that the deed was valid.

Congress went further in protection of non-competent Indians, and at the same time to enable them to sell their interests, and in 1907 passed the following Act:

Act of Congress, March 1, 1907, c 2285, 34 Stat. at L. 1018. U. S. Code Compact Ed. Sec. 405. "5 U. S. A. C. 405 (providing as follows):

"Any non-competent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law of treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or his interest under the supervision of the Commis-

> sioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple title had been issued to the allottee."

Respondents contend and the Supreme Court of the State of Utah in their decisions in this case have held that Washington Pocatello and Minnie Pocatello, in executing this deed did not come under any of the foregoing Laws of the United States, for the reason that the land in question was patented to the ancestor as a homestead and was not an allottment. The Supreme Court of Utah disposing of Appellant's contention as follows:

> "Appellants question whether Washington and Minnie Pocatello, being Indian wards of the Government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under congressional enactment there were restrictions upon alienation, had long since passed at the time of transaction. As far as revealed by the Judgment roll and other conditions prescribed by law, requisit to a valid contract by such Indians, may have been—if at all applicable—complied with." (Page 109—Petition for Appeal).

What Appellants conceded was that the five year restriction in the patent had expired.

Under Sec. 194, U. S. C. A. and by reason of the fact that this was an action to quiet title and an action

in equity, the duty was upon the Supreme Court of Utah, to examine the evidence and see whether Respondents had proven their title.

Respondents on page 6 of their statement asserted as follows:

> "the wording of the Statutes indicate that the approval of the Secretary refers only to a conveyance in violation of the restrictions, and the restrictions in the deed in the case had expired."

Appellants contend that the wording of all the U. S. Statutes heretofore quoted and relied upon convey the opposite indication, and the wording indicates that they refer to the present living Indians living under restrictions, and classed as non-competent Indians, wards of the Government, and do not apply only to the ancestor named in the original patent from the Government.

In a decision of the Federal Court of the State of Idaho, rendered 1917, the Court defined the word non-competent as applied to Indians as follows:

> "The view seems to be unavoidable that Congress intended to use the term 'non-competent' as descriptive of an Indian holding only a trust patent or other patent containing restrictions against alienation, or, what is perhaps the equivalent, an Indian to whom, even though he may be actually competent, a certificate of competency has not been issued by the Secretary of the Interior, and therefore the description 'non-competent' Indian

is inclusive of all Indians who are without full power to alienate their property."

U. S. v. Nez Perce County (D. C. Idaho, 1917) 267 F. 495.

To Appellants it does not make sense, that a white man could not go on the Fort Hall Indian Reservation and make a binding contract with Washington Pocatello and Minnie Pocatello, for sale of personal property, labor, rental or leases that would be enforceable in any Court, unless they had proceeded under the terms of the Act of Congress, March 3, 1871, now Sec. 81, U. S. A. C. But in this case Albert Saylor could go on the Reservation, and get a deed from Washington Pocatello, and Minnie Pocatello, for 80 acres of land worth fully $15,000.00 for $3,200.00, and that the deed would be valid. The Act of any incompetent White person is not valid, and if the White person has a Guardian appointed over him, no matter how incompetent he may be, he could not give a valid deed without the approval of the Guardian.

Appellants again cite the same cases, that are cited in their statement of Jurisdiction as follows:

"Restricted Indians cannot transfer property prior to the termination of their restrictions.

"The Plaintiffs undertake to avoid this inescapable conclusion from the authorities, by claiming that restricted Indians cannot by any devise transfer property prior to the termination of their restriction. **This is Settled Law.**

Staley vs. Es Penlaub et al 36 Fed 2d, 81.

To the same effect are the following decisions:

Goodman vs Buffalo (8 C. C. A.); 162 Fed. 817.

Beck v. Floumoy, 65 Fed. 30.

Sheldon v. Dunbar, 40 Kan. 346; 19 Pac. 901.

Wiggins v. Connelley, 163 U. S. 56; 16 Sup. Ct. 914; 41 L. Ed. 69.

Whether Washington Pocatello and Minnie Pocatello could give a valid deed in the first instance, that could be used subsequent to the death of Washington Pocatello, to steal their inheritance from the Appellants Indians is a federal question that this Honorable Court has jurisdiction to decide.

Third: The two foregoing questions are not the only Federal questions in this case that give this Court jurisdiction to hear and decide the case at bar; Appellants allege that the State of Utah, through the State Courts of the State of Utah, has by the decisions in this case deprived the appellants of a valuable property right, by taking said valuable property right away from those Appellants, Indians, Citizens of the United States, non-residents of the State of Utah, without any consideration or remuneration whatsoever, and without due process of law, and given the said valuable property right to residents of the State of Utah. That the State of Utah through the Courts of the State of Utah has denied these Appellants brought within its jurisdiction by White persons for the purpose of depriving those Appellants of a valuable property right,

the equal protection of the laws of the State of Utah and the laws of the United States in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and has permitted the citizens of the State of Utah to the same as steal from Appellants a valuable property right inherited from their Ancestors, and given it to White persons, citizens of the State of Utah; that the pleadings, evidence and record in this case establishes clear and unequivicably, the following facts:

That the United States of America on May the 31st, 1884, patented the said 80 acres of land involved in this suit, to an Indian woman of the name of Yaotes Owa, widow of Pooe Owa, that the said patent was filed of record in Box Elder County March 26, 1887, the record further shows that the patentee died in the late eighties; no petition for administration of the estate was instituted during all the years until 1917; that some years previous to 1917, about 65 acres of the said 80 acres was placed in good state of cultivation through some system inaugurated in that community, that the Appellants and their parents had no knowledge and were not a party to, they being ignorant of what interest if any they had in this land. The evidence showing that by the year 1917, that this 80 acres of land had become very valuable; that a White person, by the name of Albert Saylor, set out to try and obtain title to this 80 acres of land for one U. F. Diteman, and came to the conclusion that Washington Pocatello, an Indian living on the Fort Hall Indian Reservation, was the sole heir of Yaotes Owa, deceased, and on the 2nd day of February, 1919, sec-

ured a warranty deed from the said Washington Pocatello and his wife Minnie Pocatello for the consideration of $3200.00, paying only $200.00 cash, and on the 2nd day of February, 1917, placed said deed in escrow in the First National Bank of Pocatello, Idaho, all of which facts surrounding said -escrow deposited as heretofore stated were filed of record in Box Elder County, Utah. Naturally, the estate of Yaotes Owa had to be probated, through the District Court of Box Elder County, Utah, there being no probate court in the State of Utah. All estates are administered by the District Court. Respondents attempt to say that Appellants came into the Courts of Utah, and therefore they have to accept whatever treatment is handed out to them by the Courts of Utah; Appellant's Father did not voluntarily come into the State of Utah, or the Courts of the State of Utah, he was brought into the Courts of Utah, by the White persons who desired to get possession of his valuable inheritance for a paltry sum and the District Court of the First Judicial District of the State of Utah in and for Box Elder County readily assumed jurisdiction of his property, and exercised that jurisdiction and administration of that property just long enough to permit the White persons, citizens of the State of Utah, to the same as steal his inheritance which had by his death descended to his heirs. And then the District Court above named would not even attempt to settle his estate. Said District Court would not hold a hearing on the petition of the administrator, the man who the Court selected for, and recommended to, those ignorant heirs of Washington Pocatello, deceased, as a proper person to represent them, and then after seventeen years trying

to find out what became of their inheritance, they do finally come into this same Court, to try and recover their inheritance, the same Court writes its Finding, Nos. 17 and 18, and tells them that an Administrator was appointed by the Court, and that they knew that an Administrator was appointed because they had made inquiry at different times to the Superintendent of the Reservation, and that because such Administrator was appointed and was acting, or supposed to be acting, that they were now barred by the Statute of Limitations, notwithstanding that the same Court never had the Administrator even file an inventory in the estate, and refused and neglected to even hold the hearing that the Administratr asked for, but let it lie on the docket and permitted the Administrator to leave the State of Utah and take with him or to himself, the paltry sum that A. I. Grover paid to the escrow holder for the deed he filed of record. And the said Court now says because the deed was filed of record showing a consideration of $3,200.00, and the Court was not satisfied from the evidence the Plaintiffs produced—including the report of the Administrator, the Court's own officer—the Court was going to hold that the full amount of the escrow agreement was paid and that the deed was validly delivered. And in order to make title for the White persons, citizens of the State of Utah, against those ignorant Indians, non-residents of the State of Utah, the Court adopts the fiction of relation back to the time the deed was placed in escrow to circumvent the Statute of the State of Utah, Section 6405 Civil Laws of the State of Utah, 1917, which at present is Sec. 101-4-2 Revised Statutes of Utah, 1933, which provides:

"Property of Intestate Passes to Heirs subject to probate proceedings.

"The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the Court, and to the possession of any Administrator appointed by the Court for the purpose of administration." (C. L. 17, Sec. 6405).

The moment that Washington Pocatello died, whatever interest he had in that 80 acres of land immediately vested in his heirs. The decrees in the estate of Yaotes Owa, and Jane and James Brown decree the property to the estate of Washington Pocatello, deceased. It was not decreed to Washington Pocatello individually as it was known to all concerned that Washington Pocatello was dead. The foregoing is no exaggerated statement, the record in the case is so clear and plain that all who run may read. Yet Respondents say in the last sentence of the second paragraph on page five of their statement:

"Appellants had a fair trial in the lower court and have not been deprived of their constitutional rights."

There is no question, this Court has jurisdiction to examine the record and see whether the Appellants have or have not been denied a constitutional right and had a fair trial. This land was patented to their ancestor, and whether they came in to the District Court of Box Elder County, Utah, to have that land decreed, or whether they were brought in, they had the con-

stitutional right that the Court would properly administer the estate. Such is the very highest judicial duty and obligation of a Court:

The Supreme Court of Nebraska recently has held as follows:

> "There is no higher nor more solemn obligation of the Courts than to see to it that estates which undergo administration are carefully guarded and preserved especially where the interest of minor heirs are effected."

In re Love Estate (Neb.) 286 N. W. 38 (6-19-39).

The District Court files and proceedings in the estate of Washington Pocatello, deceased, Probate File No. 355, are a part of this case, and the courts were bound to take judicial notice of the entire file and proceedings at the hearing in this case. In the case at Bar, at the time of trial in the lower Court the whole record in the estate of Washington Pocatello, deceased, was placed in evidence in this case, the following is taken from the record at the time of trial:

> Mr. LOWE: No objection to the introduction of the whole record.
>
> THE COURT: Probate File No. 355, the Estate of Washington Pocatello, the files are all received in evidence.

As Appellants has stated before, we repeat again, that probate file in the Washington Pocatello estate, contained the Final Account of the Administrator

Charles E. Foxley, which set forth his account with the estate as follows:

> CASH ACCOUNT: Of Whom Received.
>
> Answer: First Nat'l Bank of Pocatello, Idaho.
>
> On or For What: Land Contract of Sale by deceased and wife. Dollars $995.00.
>
> On the next page under the head: GENERAL ACCOUNT, appeared the following:
>
> "Set Forth: A brief description of the property belonging to said Estate and within the jurisdiction of said Court, that has come to the possession or knowledge of petitioner (moneys excepted) the appraised value of said property; whether the said property still belongs to said Estate, and if not, how the same was disposed of."

In answer to that demand in the General Account, Charles E. Foxley as Administrator on the same page gives the following description and report of the property:

> "The property described in the petition for letters an undivided one third interest in the estate of Yaotes Owa, or one third of the East ½ of S. E. ¼ of Section 12. Tp. 11 N. R. 3 West S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

The next item of the said account is as follows:

"(b) Show all expenditures during the period of time mentioned, of moneys belonging to said estate."

In that item the administrator listed the following:

"To Whom Paid: To Charles E. Foxley; On or For What:

Att'y Fee representing heirs in obtaining determination of heirs and by which said property came to the estate, after new-trial-having been decreed to others on first trial $497.00
Filing Pet Adm. 2.00
Notice to Creditors 5.00

504.00

Therefore petitioner prays that this account be allowed, approved and settled. Dated March 3rd, 1921.

Charles E. Foxley, Petitioner.

The said final account was verified as follows:

STATE OF UTAH)
) ss.
County of Box Elder)

Chas. E. Foxley, being first duly sworn deposes and says: I am the Administrator of the estate of Washington Pocatello, deceased. The foregoing account for the period above mentioned of my administration of the said estate, is in all respects just and true and according to the best of my

knowledge, information and belief, contains a full, true and particular account of the said estate for and during the said period of time, and of all sums of money belonging to said estate which have come into my hands as such Administrator, or which has been received by any other person by my order or authority for my use, and I do not know of error or ommission in the said account to the prejudice of any person interested in said estate. I further swear that the items of expenditure not exceeding twenty dollars, for which no vouchers are produced have been actually paid and disbursed by me, at the date when, the place where, and to the persons respectively to whom the said payments are stated in said account to have been made; and that the said account exhibits not only the debts that have been paid, but also a statement of all of which have been duly presented and allowed against the said estate, and of all claims against the said estate which have been presented and rejected, during the period embraced in said account.

Charles E. Foxley.

Subscribed and sworn to before me this third day of March, A. D. 1921.

LeRoy B. Young, Notary Public.

My Commission expires Aug. 24, 1921.

Notary Seal.

Here is a sworn record in the files of the Court of

Washington Pocatello, deceased, a record in this case, and also admitted in evidence in this case, that the Court holds is not evidence that only $1,000 was paid for the Washington Pocatello deed. And one of the reasons given is that the account was never settled and allowed.

As before stated the record in said estate and in said file shows that the Clerk of the Court set Monday the 14th day of March, 1921, at the County Court House, in the Court Room of said Court, in Brigham City, Box Elder County, Utah, as the time and place for hearing said account, and sent out legal notices to that effect; that no hearing was held on the date set, and the record shows that a verified objection dated 14th day of March, 1921, was filed in said court in said estate on August 27th, 1921, to the settlement of said account, said objections are as follows:

"1. That no Inventory has been filed in said Court.

"2. That item of $497.00 as attorney's fee which the said Charles E. Foxley is claiming is unreasonable and excessive, and the closing of said estate has been unreasonably delayed.

"3. That said item of $497.00 is not a proper and legal charge, and no interest has been accounted for since money has been in hands of the Administrator.

"Wherefore; contestant prays that the said account be not allowed, approved or settled as the same is rendered.

"Objectors prays for such other and further order that is just.

B. C. Call, Attorney for Contestants."

The said District Court record in the Probate Matter in said estate shows that Judge Albert A. Law on Sept. 12, 1921, made an order setting said matter for hearing for 10 a. m. on the 10th day of October, 1921, and as heretofore stated in this brief that the said Judge and his successors kept continuing the date for said hearing from month to month, the last date set for hearing being the 13th day of February, 1922; that no hearing was held, and no disposition of said Matter was made on the said 13th day of February, 1922, and no action of any kind has been taken by said District Court on said petition and final account, or on any other matter in the estate of Washington Pocatello, deceased, from that day until this; that the District Court of the First Judicial District of Utah, in and for Box Elder County, disregarding the Courts most solemn judicial obligation, has during all of the years denied to these Appellants, the heirs of the estate of Washington Pocatello, deceased, the protection of the Probate Code of the State of Utah, by failing, refusing and neglecting to hold any hearing, of any kind or manner whatsoever in said estate, and said Court permitted the said Albert I. Grover to the same as steal the land inherited by these Appellants, and the said Court permitted the Administrator, Charles E. Foxley, that the District Court of said County had recommended to those ignorant Indians, as a proper person to represent them to steal the $995.00 that the said Grover had paid for their Father's deed. The record abso-

lutely showing that the heirs, the Appellants, never received one cent of their inheritance. Then when the heirs come into the same Court to ascertain what become of their inheritance, the same Court cold-bloodedly tell those heirs—and it is immaterial whether they are Indians or White persons—that the Court does not recognize the sworn report of its own officer, the Administrator in the estate, that only $1,000.00 was paid for the deed of their father and mother, and that for the reason that the deed was filed of record showing a consideration of $3,200.00 that the Court was going to assume that the full amount was paid to the escrow holder by U. F. Diteman or someone for him, and it is immaterial who got the money and by virtue of the doctrine—so the Court calls it—the Court is going to adopt the fiction of relation back of the deed to the date it was executed, so as to make a title for the present owners of the rightful inheritance of those Indians, and, further, for the reason that an Administrator was appointed—although the Court never took any action on his reports and the estate was never closed—that the statute of limitations had run against them.

Respondents can try to cover up the real facts by all the camouflage and smoke screens that it is possible to invent, but the record shows the cold facts to be, that the white persons took every cent of the Appellant's inheritance, and the Courts of Utah aided and permitted the said white persons to do that very thing.

The Supreme Court of the State of Utah refused to take judicial notice of the probate file and proceedings in the District Court in the estate of Washington Po-

catello, deceased, and strikes the Bill of Exceptions on Respondent's motion, and for that reason refuses to consider the facts in the case, and approves the fiction of relation back of the deed, so as to cut the heirs out of their rightful inheritance, by holding that the account and report of the Administrator might not tell all the truth. Referring to the final account of the Administrator the Supreme Court said:

> "With this contention we cannot agree. The report of the Administrator was never heard or passed upon by the Probate Court. We cannot say that it necessarily spoke the truth with respect to the amount received by the Administrator from the bank, nor the report established that the bank delivered to him the total of the amount paid by the grantee for the deed, especially since the stricken bill may contain evidence which precludes any inference which might possibly be drawn therefrom."

That sworn account of the Administrator was certainly strong prima facie evidence, it being sworn to and a record of the Court in this case, its truth must stand until it was proven by competent evidence to be false or wrong. Probate proceedings are indivisable, and all matters pertaining to an estate are a part of the probate proceedings from the appointment of the Administrator until the estate is closed and the Administrator is discharged.

The Supreme Court of California, whose laws are similar to the State of Utah, that is all probate proceedings are through the Superior Court in California,

and are conducted through the District Court in the State of Utah, and the California Court has recently held as follows:

> "The administration of an estate is one indivisable judicial proceeding from the order appointing the Administrator till his discharge." Food v. Roach 126 Cal. App. 631, 14 Pac. 2nd, 170. While sitting in probate, the superior Court may determine the validity of a contract whereby it is claimed a spouse has been divested of all interest in the estate. Estate of Cover, 188 Cal. 133, 204 Pac. 583; Estate of Warner 6 Cal. App. 361, 92 Pac. 191. The fact that it is acting in probate when called upon to apply rules in equity or principles of law to decide a question requiring settlement, does not affect its jurisdiction to do so. As a probate Court in determining issues arising in the administration of an estate, "It may bring to its aid the full equitable and legal powers with which, as the Superior Court, it is vested." Estate of Bell, 168 Cal. 253, 141 P. 1179-80. When the Superior Court has jurisdiction of the subject-matter of a case, falling within either equity or law, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancilliary to a proper judgment."
>
> In re Dobins Estate, Dobins v. Title Guarantee & Trust Co. et al. 97 Pac. 2nd, 1051, 1055.

Appellants father had no other Court to go to for the purpose of decreeing his inheritance, but the District

Court of Box Elder County, Utah. The Supreme Court of Utah has recently held:

> "Federal Courts have no jurisdiction in probate matters in respect to the administration of the estate of deceased persons."
>
> Zion Sav. Bank & Trust Co. v. Harris (Utah) 105 Pac. 2nd, 461, 472. (decided Sept. 13, 1940).

In a probate matter, a non-resident of the State of Utah can appeal to the Supreme Court of the United States if he rightfully contends and can show that his inheritance was completely taken away from him in the courts of Utah, and he was denied the protection of the Probate Code of Utah. In the case at Bar, the action to quiet title could have been brought in the Federal Court, but no accounting could be had in the Federal Court, and besides the whole matter of the estate of Washington Pocatello, deceased, was in the State Court of Utah since the State Court appointed the Administrator.

Respondents on page 9 of their statement, make the astounding argument as follows:

> "Furthermore, the application of the doctrine of relation back does result in a "furtherance of justice".

That is an astounding statement in the face of the record that shows the heirs were robbed of every cent of their inheritance; and then respondents go on and say:

> "Foxley v. Rich et al., 35 Utah 162; 99 Pac. 666,

cited by Appellants is a case in which rights of third parties had intervened."

That is immaterial whether third party rights have intervened or not, what right of a third party could be more solemn or sacred than the inheritance right of heirs. The most astounding expression of Respondents is when on the same page they say:

"Here the heirs gave no value for the land, so are not intervening parties. Indeed, they would be unjustly enriched if they were allowed to retain land which had been sold by their ancestor, for they would inherit both the land and the purchase price. (which the Court found had been paid)."

How Respondents can make such a statement in the face of the record that shows that the heirs did not even receive a cent of the $1000.00 that was paid into the Bank for the deed, as found by the Court, which findings were prepared by counsel for Respondents and in part are as follows:

"That in the summer of 1921 Superintendent Donner called Minnie Pocatello and her daughters, Plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello, and that after deducting attorney's fee and cost there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties." (Finding No. 18).

Now the record shows and it is admitted by all part-

ies that the District Court of Box Elder County never heard the petition and account of the Administrator Charles E. Foxley, no order of settlement of the account, and distribution was ever made, that the Court refused and neglected to settle the estate, but permitted Charles E. Foxley to take the full amount of the $995.00 he reported he received from the First National Bank of Pocatello to himself, and the transcript of the testimony shows the heirs never received one cent of their inheritance. It should be very noticeable that Respondents throughout their statement never attempt to say that it was proved that the full amount was paid for this deed, they rely on the fact that the lower court presumed and thereby found that the full amount had been paid, and because the lower court so found, and the Supreme Court of the State of Utah, struck the Bill of Exceptions, that the finding of the lower court cannot be disturbed.

Fourth: The case at Bar is an action to quiet title, and is an equity case. The Respondents came in and pleaded affirmative relief, that the court quiet title to the undivided one-third interest in Respondents. The findings of the lower Court prove, that the lower Court found and adopted the fiction of relation back, on the ground that the deed was filed of record and on its face it showed a consideration of $3200.00, and for that reason despite the account of the Administrator the lower Court arbitrarily held that the full amount had been paid by some one to some one, and on such presumption, the lower court determined to make a deed for the Respondents, and thereby deprive Appellants of their inheritance; that the Supreme Court

of Utah, the highest Court in the State, struck the Bill of Exceptions, refused to review the testimony in the case, refused to take judicial notice of the account of the Administrator in the estate of Washington Pocatello, deceased on the ground that the report might not tell the truth, and affirmed the adoption by the lower Court of the fiction of relation back in this case; that Appellants allege that thereby the Supreme Court of the State of Utah, denied to those Appellants the equal protection of the laws of the State of Utah, and denied to Appellants the protection of the laws of the United States, and pronounced the final word in the State of Utah taking from the Appellants, Indians, non-residents of the State of Utah, a valuable inheritance for which Appellants had not received one cent, and gave it to White persons, residents of the State of Utah. Contrary to the laws of Utah, and contrary to many of the previous decisions of the Supreme Court of Utah, and in support of this assertion we quote the following authority:

Section 104-41-1 Revised Statutes of Utah, 1933, Provides:

"From all final judgments of the district Courts, except in certain cases specially provided for originating in city courts and in justice's Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the district Court. **In equity cases the appeal may be on questions of law and fact;** in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of dece-

dents estates and in case of guardianshij'

In the case at bar, the appeal was taken on uestions of law and fact and from the whole thereof.

The Supreme Court of the State of Utah, n other cases has repeatedly held that in equity cases ne Supreme Court must pass on questions of fact aswell as law, and must review the record of the tri: of the case to determine whether the facts sustain ne findings and judgment, the following are only son: of the decisions on that point in a very recent case ne Supreme Court of Utah said:

> "This being an equity case we are reuired to examine the evidence and determine te facts for ourselves. It has sometimes been stted the review of an equity case under our contitution and laws is a trial de novo upon the reord. In equity cases the review in this Court "in:ffect is a trial de novo on the record," Jensen vHowell, 75 Utah 64, 282, P. 1034, 1038. "In an eqity case, this court is authorized to review both uestions of law and of fact." Independent Oil andGas Co. v. Shelton et al., 79 Utah. 384, 6 P. 2d, 102, 1032."
>
> Federal Land Bank of Berkeley, v. Slt Lake Valley Sand & Gravel Co. et al., 85. Pac2d, 791.

The case just above quoted from was decidd by the Supreme Court of Utah, on the 3rd day of anuary, 1939, and in that decision they quote the cas of Jensen vs. Howell, where the Court held it wa a trial de novo on the record in the case. In the cae at bar

the entire record in the lower court, was brought before the Supreme Court by a bill of exceptions that was allowed and settled by the lower court, and the Supreme Court strikes that bill of exceptions on Respondent's motion, and refuses to apply to these Appellants the same rule of law that the Court applied in the above quoted cases.

Respondents on page 8 of their statement say:

> "Appellants, second reason why the burden should have been placed on Respondents is that this is an equity action in which questions of both law and fact are reviewed. This involves no Federal question, furthermore, it is an unsound contention for even in equity action the burden is always on Defendant."

In the case at bar, the record will show that the Appellant sustained the burden of proof in the lower Court, and proved that the deed was the same as stolen, and that Appellants never received a cent of their inheritance, and besides the burden of proof in this case is a Federal Question. First: under Section 194, U. S. C. A. the Act of Congress, passed for the protection of Indians; that protection follows the Indians as heretofore set forth clear to the Supreme Court of the United States. Second: by striking the bill of exceptions and refusing to examine the record, the Supreme Court of Utah has discriminated against the Appellants, and denied to the Appellants the equal protection of the laws of Utah. Appellants humbly ask this Honorable Court this question: Can the Supreme Court write the above cited decision on the 3rd of

January, 1939, stating that the Supreme Court in all equity cases "are required to examine the evidence and determine the facts for ourselves; and that equity cases in fact is a trial de novo on the record", and then in the case at bar on July 17th, 1940, strike Appellant's bill of exceptions on the motion of Respondent and refuse to consider the evidence in the case; is that not a discrimination in favor of residents of Utah against non-residents of Utah?

Respondents cite to this Court the case of Hardgraves v. Burton, Appellants respectfully calls the Court's attention to that case, and we quote what the Supreme Court of Utah said:

> "But as said in the beginning, this is a case in equity in which we are required to determine the facts as well as law, and in which we are not bound by the Finding of the trial Court, if, in our opinion they are clearly against the weight of the evidence."
>
> Hardgraves v. Burton, 39 Utah, 575, 585; 206 Pac. 262.

In all the previous equity cases brought before the Supreme Court of Utah, the Court has held that they are bound and required to examine and consider the evidence taken in the case, but in this case they strike the bill of exceptions and say they cannot consider the facts, and say they are bound by the findings of the lower court.

The case of Escamilla vs. Pingree, cited by Respon-

dents, supports Appellant's contention that the Supreme Court was discriminating against the Appellants when the Court dismissed the bill of exceptions, as the Court said in that case:

> "The case is purely equitable, and the mere fact that a jury was called to pass on the facts in no way affects the character of the case. Nor did that fact in any way affect the province or duties of the trial Court. Nor can it affect those of this court relative to equity cases.
>
> Escamilla v. Pingree, 44 Ut. 421, 427; 141 Pac. 103.

Appellants allege that the case of Tatsuono v. Kasai 70 Utah, 203, 259 Pac. 318, if at all in point in this case, supports Appellant's contention much more strongly than it supports Respondent's contention. The Court first said:

> "That Appellants have burden of showing the judgment is eroneous."

In the case at bar, the Appellants contend that they have overwhelmingly shown to the Supreme Court that judgment of the lower Court was erroneous, also in that case the Court said:

> "While the findings by assignment are challenged as not being supported by the evidence or as being against the greater weight of the evidence, yet little is said concerning such matters and nothing of substance pointed out and our attention called there to which requires contrary

findings or a modification of the findings by this Court."

Appellants further call this Court's attention to the fact that the above quoted case by the Respondents involved property that was wrongfully taken from Respondent, and the lower Court had returned Respondent his property and the other party appealed.

Respondent on the same page of their statement alleges as follows:

> "The Probate proceedings which Appellant claimed is entitled to judicial notice is no more a judicial proceeding than the present case."

Appellants do not understand what Respondents mean by that assertion. The case at bar is an action to quiet title and for an accounting of the rents and profits of property that was decreed to the estate of Washington Pocatello, deceased. A Special Administrator was appointed by the Court, in the estate of Washington Pocatello, deceased, to join with the heirs and the Court is bound to take judicial notice of all the records in the case. It is very evident from the Court's findings of fact that the Trial Court did take judicial notice and construed the probate proceedings in the Washington Pocatello estate, to the benefit of the Respondents when the Court found as follows, in Finding 15:

> "That on December the 3rd, Charles E. Foxley filed in the probate division of this Court a Petition for letters of Administration on the estate of

Washington Pocatello, deceased, which said Petition was supported by the Petition and Request of the heirs of Washington Pocatello, deceased, and after due and legal proceedings, had the said Charles E. Foxley was regularly appointed Administrator of said Estate and Letters of Administration were, on the 12th day of January, 1920, issued out of this Court to the said Charles E. Foxley on said estate; that the said Charles E. Foxley as Administrator and as the legally appointed representative of the heirs of said estate failed to take any legal steps to recover the alleged one-third interest in said eighty acres of land from A. I. Grover, although the Court finds that the said Charles E. Foxley was appointed at the request of the heirs of Washington Pocatello and said heirs at all times knew that the said Charles E. Foxley, as such administrator, represented them and the said estate of Washington Pocatello; the Court finds that there is no proof that Charles E. Foxley as Administrator of said estate or otherwise connived and conspired with A. I. Grover, and the Court therefore finds that the said A. I. Grover did not fraudulently connive and conspire with the said Charles E. Foxley, Administrator of said estate, or otherwise, and that "said Charles E. Foxley did not improperly accept from the First National Bank of Pocatello, Idaho, any money with intent to cheat and defraud the heirs of Washington Pocatello, deceased; that said Charles E. Foxley did not connive and conspire with A. I. Grover to file a copy of Letters of Administration

with the First National Bank of Pocatello, Idaho, for the purpose of obtaining the said deed of Washington Pocatello and Minnie Pocatello, his wife, covering said property; that there was no evidence offered to the Court as to the whereabouts of Charles E. Foxley and the Court finds that the proceedings in the Estate of Washington Pocatello **were regular insofar as administered** and that from January 12th, 1920, the date of appointment of the said Charles E. Foxley, to the date of the filing of complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate." (Finding 15. Trans. 0319, 0320).

Appellants allege that the foregoing finding made by the trial Court is so contrary to and directly opposite to the evidence produced in the case, that it shows that the Court was determined to make a title for the Respondents. Said finding charges that the heirs are the ones that are to blame because the said Court itself did not perform its solemn obligations and perform its duty in Administering the estate of Washington Pocatello, deceased.

IN CONCLUSION: Appellants respectively allege that the record in this case striped of all verbiage, shows conclusively that Appellants and their ancestors were full-blooded Indians, wards of the Government, non-residents of the State of Utah, that they

were brought into the District Court of Box Elder County, Utah, by artful and designing White persons, for one purpose only, that is to obtain from them, without any just consideration for the same, their valuable inheritance. And the record further shows that the District Court of Box Elder County, Utah, assumed, and acquired jurisdiction over their rights and inheritance, and performed its duties just long enough to permit the artful and designing White persons, residents of the State of Utah, to rob them of every cent of that inheritance, and as soon as the entire inheritance was snugly in the hands of the Citizens and residents of Utah, then the Court for over 17 years refused and neglected to apply to or give those Appellants the benefit of or the protection of the Probate Laws of the State of Utah, or to give Appellants any protection, that record in said District Court is so clear and plain that he who runs may read, and now, when the Appellants did come into said Court to try and ascertain what became of their inheritance and to reclaim the same, they are told by that Court they have no standing in that Court, that they are barred by the statute of limitations, that the Court appointed an Administrator over their estate and they knew it. And the Court arbitrarily makes a title for the White persons, citizens and residents of its own state.

If that is not a violation of the Fourteenth Amendment of the Constitution of the United States, and denying these Appellants the equal protection of the laws, and taking their property and inheritance away from them in violation of the Fourteenth Amendment

of the Constitution of the United States, that gives this Honorable Court jurisdiction to examine the whole record and determine whether Appellant's charges are true or not, then Appellants fail to see what would be necessary to give this Court jurisdiction, and Appellants will have to forget they ever were given an inheritance in the State of Utah.

Respectfully submitted,

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